

No. 16179 ✓

United States
Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant.

vs.

DAN T. KENNEDY,

Appellee.

Transcript of Record

Appeal from the District Court
for the District of Alaska,
Third Division

FILE

MAR 26 1959

PAUL P. O'BRIEN,



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

PERRY W. NORTON,
Asst. Attorney General;

ROGER P. MARQUIS,
A. DONALD MILEUR,
Dept. of Justice,
Washington 25, D. C.;

WILLIAM T. PLUMMER,
U. S. Attorney,
Anchorage, Alaska,
For Appellant.

DAVIS, HUGHES & THORSNESS,
Box 477,
Anchorage, Alaska,
For Appellee.

In the District Court for the District of Alaska,
Fourth Judicial Division

No. 6885

UNITED STATES OF AMERICA,

Plaintiff,

vs.

40 ACRES OF LAND, Situate in Nenana Recording Precinct, Fourth Division, Territory of Alaska, and DAN T. KENNEDY, DUKE E.

STUBBS, MRS. ELIZABETH S. STUBBS
and All Other Persons or Parties Unknown
Claiming Any Right, Title, Estate, Lien or Interest in the Real Estate Described Herein,

Defendants.

COMPLAINT

1. This is an action of a civil nature brought by the United States of America for the taking of property under the power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is "Act approved August 1, 1888 (C. 728, pars. 1 and 2, 25 Stat. 357) as amended (62 Stat. 986; 40 U.S.C. 1946 ed., Supp. II, Sec. 257)" and "Chapter VII, Public Law 759, 81st Congress."

3. The use for which the property is to be taken is as a part of Mount McKinley National Park, Alaska, within which exterior boundaries it is now located.

4. The interest to be acquired in the property is an estate in fee simple.

5. The property so to be taken is in the Nenana Recording Precinct, Fourth Judicial Division, Territory of Alaska, and is more particularly described as follows:

Tract A: The south half ($\frac{1}{2}$) of the northwest quarter ($\frac{1}{4}$) of the southeast quarter ($\frac{1}{4}$) of the northeast quarter ($\frac{1}{4}$) of Section 4 in Township 14 South of Range 7 West of the Fairbanks Meridian, Alaska, containing five acres, according to the Official Plat of Survey of the said land, on file in the Bureau of Land Management;

Tract B: The south half ($\frac{1}{2}$) of the southeast quarter ($\frac{1}{4}$) of the northeast quarter ($\frac{1}{4}$); the north half ($\frac{1}{2}$) of the north half ($\frac{1}{2}$) of the northeast quarter ($\frac{1}{4}$) of the southeast quarter ($\frac{1}{4}$), and the north half ($\frac{1}{2}$) of the south half ($\frac{1}{2}$) of the north half ($\frac{1}{2}$) of the northeast quarter ($\frac{1}{4}$) of the southeast quarter ($\frac{1}{4}$) of Section 4 in Township 14 South of Range 7 West of the Fairbanks Meridian, Alaska, containing thirty-five (35) acres, according to the official Plat of Survey of the said land, on file in the Bureau of Land Management,

together with all buildings and improvements, if any, all appurtenances thereto, and all interests

therein, as shown on the plat attached hereto and by this reference made a part hereof.

6. The persons known to the plaintiff to have or claim an interest in the property are:

Tract A (as described in paragraph 5)—Dan T. Kennedy.

Tract B (as described in paragraph 5)—Duke E. Stubbs, Mrs. Elizabeth S. Stubbs.

7. In addition to the persons named, there are or may be others who have or claim some interest in the property to be taken, whose names are unknown to the plaintiff and on diligent inquiry have not been ascertained. They are made parties to the action under the designation “Unknown Owners.”

Wherefore, the plaintiff demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

.....,

United States Attorney;

/s/ HUBERT A. GILBERT,

Asst. U. S. Attorney.

[Endorsed]: Filed September 6, 1951.

[Title of District Court and Cause.]

ORDER DIRECTING PUBLICATION
OF NOTICE

Now, on this 2nd day of November, 1951, this matter coming on for hearing on plaintiff's Motion for an Order for service of Notice herein by publication; and

It appearing to the court that the plaintiff has good cause of action against the defendants, known and unknown, named in the title of this cause hereinabove set forth; and,

That Jessen's Weekly is a weekly newspaper of general circulation and regularly published at Fairbanks, Alaska, and the most likely to give notice to the defendants;

Now, Therefore, It Is Hereby Ordered that notice herein be served upon the said defendants, and each of them, by publishing the same in said Jessen's Weekly once each week for four consecutive weeks, commencing with the issue of November 8th, 1951, as well as by forthwith mailing a copy of said Notice and Complaint to each of the defendants whose place of residence is known, in the United States Post Office at Fairbanks, Alaska, postage prepaid, directed to each of said defendants at his place of residence as shown in the Affidavit supporting the plaintiff's Motion upon which this Order is based.

Done at Fairbanks, Alaska, this 2nd day of Nov., 1951.

/s/ HARRY E. PRATT,
District Judge.

[Endorsed]: Filed November 2, 1951.

[Title of District Court and Cause.]

SEPARATE ANSWER OF DEFENDANT
DAN T. KENNEDY

Comes now Dan T. Kennedy, one of the above-named defendants, and for himself as the owner of Tract A described in plaintiff's complaint, but not for his co-defendants, in answer to plaintiff's complaint admits, denies and alleges as follows:

I.

Defendant admits the allegations of the first paragraph of plaintiff's complaint.

II.

Defendant admits that this action is commenced under what is now known as Title 40, U. S. Code, Section 257. Defendant has no knowledge or information concerning the other allegations of the second paragraph of plaintiff's complaint and therefore denies each and all of such allegations.

III.

Defendant admits that the property in question owned by Defendant, Dan T. Kennedy, is located

within the exterior boundaries of Mount McKinley National Park, Alaska, and denies each and all the other allegations of the third paragraph of plaintiff's complaint.

IV.

Defendant admits that his estate in the property in question is a fee simple estate. Defendant has no knowledge or information sufficient to form a belief concerning the interest in such property which is sought to be acquired by the plaintiff, and therefore denies each and all the other allegations of the fourth paragraph of the plaintiff's complaint.

V.

The defendant, Dan T. Kennedy, admits that the property owned by him and described in plaintiff's complaint as Tract A is located in Nenana Recording Precinct, Fourth Judicial Division, Territory of Alaska, and is described as set forth in the fifth paragraph of plaintiff's complaint. Defendant has no knowledge or information sufficient to form a belief concerning the other allegations of the fifth paragraph of plaintiff's complaint, and, therefore, denies each and all of such allegations.

VI.

Defendant Dan T. Kennedy alleges that he is the owner in fee simple of Tract A as described in paragraph six of plaintiff's complaint. Defendant has no knowledge or information sufficient to form a belief concerning the other allegations of the sixth paragraph of plaintiff's complaint and, therefore, denies each and all of such allegations.

VII.

Defendant Dan T. Kennedy alleges that there are no other owners or claimants of the property described as Tract A in plaintiff's complaint save and except the defendant, Dan T. Kennedy. Defendant has no knowledge or information sufficient to form a belief concerning the other allegations of the seventh paragraph of plaintiff's complaint and, therefore, denies each and all of such allegations.

As a further answer to plaintiff's complaint and by way of affirmative defense thereto, defendant alleges as follows:

I.

That the property described as Tract A in paragraph five of plaintiff's complaint was acquired by defendant, Dan T. Kennedy, more than twenty years ago as his home and as a headquarters site for operation of defendant's business as a big game guide and as a trapper and as a headquarters for certain mining operations contemplated by the defendant and that defendant used and occupied such land for those purposes until excluded therefrom by the plaintiff as hereinafter more fully set forth.

II.

That thereafter and without his knowledge and consent and against the wishes of the defendant, Dan T. Kennedy, Tract A owned by such defendant was included within the boundaries of Mount McKinley National Park when the boundary lines of such park were extended.

III.

That thereafter Defendant, Dan T. Kennedy, was prevented from carrying on his business from his property as above set forth by direction of various officials of the National Park and Service, and that defendant was forced to vacate the premises and move his home elsewhere.

IV.

That the property owned by defendant, Dan T. Kennedy, and sought to be condemned by this action is East of the Alaska Railroad and outside of the area which has been used by Mount McKinley National Park and as defendant, Dan T. Kennedy, believes and so alleges such property is actually not a part of Mount McKinley National Park and is not necessary for the use or benefit of such National Park and that there is no reason at all for defendant's property to be taken for the uses set forth in plaintiff's complaint.

Wherefore, having fully answered plaintiff's complaint defendant prays that plaintiff take nothing thereby and that defendant have and recover of and from the plaintiff costs and damages and that defendant may have all other relief provided by law in the premises.

DAVIS & RENFREW,

By /s/ EDWARD V. DAVIS,

Attorneys for the Defendant,
Dan T. Kennedy.

A jury trial in the above-entitled matter is hereby demanded.

DAVIS & RENFREW,

By /s/ EDWARD V. DAVIS,
Attorneys for Defendant,
Dan T. Kennedy.

Duly verified.

[Endorsed]: Filed November 19, 1951.

[Title of District Court and Cause.]

MOTION TO STRIKE

Comes now the plaintiff in the above-entitled action and moves this Honorable Court to strike from the separate answer of the defendant, Dan T. Kennedy, all of paragraph IV on the ground that where land is taken pursuant to an Act of Congress, the administrative determination of the agency at whose request the property is being required is not subject to judicial review.

Dated at Fairbanks, Alaska, this 18th day of January, 1952.

/s/ HUBERT A. GILBERT,
Assistant United States Attorney, Attorney for
Plaintiff.

[Endorsed]: Filed January 18, 1952.

[Title of District Court and Cause.]

ORDER

The Government was represented by Hubert A. Gilbert, Asst. U. S. Attorney; the defendant was not represented.

Mr. Gilbert had argument on * the Government's motion to strike from the answer of defendant Kennedy.

It was ordered that the motion be granted.

* * *

Entered March 7, 1952.

[Title of District Court and Cause.]

DEMAND FOR JURY TRIAL

The plaintiff in the above-entitled cause, the United States of America, demands a trial of the cause by jury.

/s/ EVERETT W. HEPP,
United States Attorney.

[Endorsed]: Filed August 26, 1952.

[Title of District Court and Cause.]

MOTION TO SET FOR TRIAL

Comes now the complainant in the above-entitled cause and represents to the court that said cause is now at issue and ready to be set for trial, and moves this Honorable Court for a day certain for the trial of said cause.

This motion is based on the files and records herein.

Dated at Fairbanks, Alaska, this 10th day of December, 1952.

/s/ R. J. McNEALY,
United States Attorney.

[Endorsed]: Filed December 12, 1952.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed between R. J. McNealy, attorney for plaintiff, and Edward V. Davis, of the firm of Davis, Renfrew and Hughes, attorneys for defendant, Dan T. Kennedy, that the above-entitled cause be set in the month of October, 1953, for trial, or such date that may be agreeable to the parties hereto and the Court.

Dated this 13th day of February, 1953.

/s/ R. J. McNEALY,
United States Attorney,
Attorney for Plaintiff.

DAVIS, RENFREW AND
HUGHES,

By /s/ EDWARD V. DAVIS,
Attorney for Defendant,
Dan T. Kennedy.

[Endorsed]: Filed February 19, 1953.

[Title of District Court and Cause.]

MOTION TO REMOVE FROM
TRIAL CALENDAR

Comes now the attorney for the Government, Theodore F. Stevens, and moves this Honorable Court for an order removing the above-entitled cause from the trial calendar for the reason that settlement negotiations are presently pending between the plaintiff and the attorney for the defendant, Dan T. Kennedy.

Dated at Fairbanks, Alaska, this 22nd day of March, 1955.

/s/ THEODORE F. STEVENS,
United States Attorney.

[Endorsed]: Filed March 23, 1955.

[Title of District Court and Cause.]

ORDER TO REMOVE FROM
TRIAL CALENDAR

This matter coming on regularly for hearing upon the motion of Theodore F. Stevens, United States Attorney, for an order removing the above-entitled cause from the trial calendar, and it appearing to the Court that settlement negotiations are presently pending between the plaintiff and the attorney for the defendant Dan T. Kennedy, now therefore:

It Is Ordered that the above-entitled matter be, and the same is hereby, removed from the trial calendar.

Dated at Fairbanks, Alaska, this 23rd day of March, 1955.

/s/ VERNON D. FORBES,
District Judge.

[Endorsed]: Filed and entered March 23, 1955.

[Title of District Court and Cause.]

MOTION FOR CHANGE OF PLACE
OF TRIAL

Comes Now Dan T. Kennedy, one of the above-named defendants and moves that the place of

trial of the above-entitled action may be changed from Fairbanks in the Fourth Judicial Division of the Territory of Alaska to Anchorage in the Third Judicial Division of the Territory of Alaska for the reason that the convenience of the witnesses and the ends of justice would be promoted by such change and for the reason that the defendant Dan T. Kennedy, at all times here in question has resided at Anchorage in the Third Judicial Division of the Territory of Alaska and now so resides at that place and for the reason that considering available means of travel the defendant, Dan T. Kennedy, will be put to unnecessary expense and inconvenience if required to appear at Fairbanks, the place in which the action has been commenced, for the trial of this matter.

This motion is based on all the records and files of this action and on the affidavit of Dan T. Kennedy, one of the above-named defendants.

DAVIS, RENFREW &
HUGHES,

By /s/ EDWARD V. DAVIS,
Attorneys for the Defendant,
Dan T. Kennedy.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Territory of Alaska,
Third Judicial Division—ss.

Dan T. Kennedy, being first duly sworn, upon his oath deposes and says:

That he is the Dan T. Kennedy named as one of the defendants in the above-entitled action. That he is the owner of certain property described as Tract "A" in plaintiff's complaint on file in this action and that he has been the owner of such property since he received patent thereto more than twenty (20) years ago. That the property involved in this matter is located near McKinley Park Station on the Alaska Railroad approximately equidistant between Anchorage, Alaska and Fairbanks, Alaska. That affiant has resided at Anchorage, Alaska, for more than ten (10) years last past and for a considerable period of time prior to the commencement of this action in the month of September of 1951. That all of defendant's witnesses reside at Anchorage, Alaska, or in that vicinity. That defendant is over eighty (80) years of age and frequently requires medical attention. That defendant has limited means and that it would cause unnecessary hardship upon the defendant to require him to transport himself and his witnesses to and from Fairbanks, Alaska, for the trial of this matter and to maintain himself and his witnesses at Fairbanks,

Alaska, while engaged in the trial of the matter. That as will appear from the records and files of this matter, the United States of America is attempting to acquire defendant's property by condemnation. That if defendant is required to go to Fairbanks, Alaska, to defend the above-entitled matter and if he is required to have his witnesses at such place that the cost of such transportation and of maintaining defendant and his witnesses at Fairbanks, Alaska, would in effect seriously cut down the amount of money which would remain net to the defendant upon determination of the value of the property in the event the Court should decide to allow the requested condemnation of defendant's property and would in effect amount to a taking of defendant's property without just compensation therefor. That the plaintiff in this action and its agents at all times have known that the defendant, Dan T. Kennedy, was a resident of Anchorage, Alaska, and that a trial of this matter at Fairbanks, Alaska, would seriously hinder the defendant in making his defense to such action and as defendant is informed and believes and so alleges the fact to be the action was commenced at Fairbanks, Alaska, rather than at Anchorage, Alaska, for the specific purpose of causing the defendant, Dan T. Kennedy, unnecessary expense or inconvenience. That as affiant is informed and believes and so alleges the fact to be it is just as convenient for the plaintiff's witnesses to meet at Anchorage, Alaska, as it is for them to meet at Fairbanks, Alaska, and that the matter can be handled in Anchorage,

Alaska, by the District Attorney at that place or at the option of the Government by the District Attorney of the Fourth Division of the Territory of Alaska and for that reason trial of the matter at Fairbanks would cause unnecessary expense and inconvenience to the defendant without corresponding benefit to the Government as plaintiff. That for the foregoing reasons affiant believes that the convenience of witnesses, including affiant and the ends of justice would be promoted by changing the place of trial from Fairbanks, Alaska, to Anchorage, Alaska, as prayed in defendant's motion.

/s/ DAN T. KENNEDY.

Subscribed and sworn to before me this 14th day of April, 1955.

[Seal] /s/ EDWARD V. DAVIS,
Notary Public for Alaska.

My commission expires: 11/7/1958.

[Endorsed]: Filed April 21, 1955.

[Title of District Court and Cause.]

ORDER

The Government was represented by Theodore F. Stevens, U. S. Attorney, the defendant was neither present nor represented.

On the Motion of Mr. Stevens, it was Ordered that this cause be removed from the calendar, pending further negotiations.

Entered September 9, 1955.

[Title of District Court and Cause.]

STIPULATION

Whereas, the default of the defendants herein was entered upon the 25th day of August, 1952, for failure to answer or otherwise plead, and

Whereas Duke E. Stubbs died in 1939, and by will filed in the State of Washington January 31, 1940, said Duke E. Stubbs bequeathed and devised his entire estate to Mrs. Elizabeth S. Stubbs, with the exception of One Dollar (\$1.00) each to the children of Duke E. Stubbs, and

Whereas Mrs. Elizabeth S. Stubbs died on the 13th day of September, 1954, in the State of New York, leaving a last will and testament, which has been duly probated in the Surrogate's Court of the State of New York, County of Bronx, and letters testamentally filed in said Court on the 3rd day of March, 1955, a copy of which is attached to this stipulation, and

Whereas Mary E. Weiss, the executrix of the estate of Mrs. Elizabeth S. Stubbs, is desirous of entering into a settlement in regard to the interest of Mrs. Elizabeth E. Stubbs and the property described in the complaint herein, including the interest of Mrs. Elizabeth E. Stubbs, which was obtained pursuant to the will of Duke E. Stubbs, as aforesaid.

It Is Therefore Hereby Stipulated that judgment be entered in the amount of Four Thousand

(\$4,000.00) inclusive of interest as just compensation for Tract B, to wit, the property described as belonging to Duke E. Stubbs and Mrs. Elizabeth S. Stubbs in the complaint herein filed on September 6, 1951; and that neither party be awarded costs in this action.

Dated at New York, N. Y., this 6th day of February, 1956.

/s/ MARY E. WEISS,
Executrix of Estate
of Mrs. Elizabeth E. Stubbs.

Subscribed and sworn to before me this 6th day of February, 1956.

/s/ ROBERT SHAPIRO,
Commissioner of Deeds, City of New York, Bronx
Co. Clk's No. S-38-56, Reg. No. 6-5-24, N. Y.
Co. Clk's No. 152, Reg. No. 6-S-46.

Commission expires September 20, 1956.

/s/ BERNSTEIN & SHAPIRO,
Attorneys for Mary E. Weiss.

Dated at Fairbanks, Alaska, this 16th day of February, 1956.

/s/ THEODORE F. STEVENS,
United States Attorney.

No. 30901

The People of the State of New York, to all to
whom these presents shall come or may concern,

Send Greeting:

Know Ye, That we, having inspected the Records of our Surrogate's Court in and for the County of Bronx, do find that on the 1st day of March in the year one thousand nine hundred and fifty-five, by said Court, Letters Testamentary on the estate of Elizabeth S. Stubbs, late of the County of Bronx, deceased, were granted unto Mary E. Weiss, of the County of Westchester the Executrix named in the last Will and Testament of said deceased, and that it does not appear by said Records that said Letters have been revoked.

In Testimony Whereof, we have caused the Seal of the Surrogate's Court of the County of Bronx to be hereunto affixed.

Witness, Hon. Christopher C. McGrath, Surrogate of our said County, in The City of New York, the 3rd day of March, in the year of our Lord one thousand nine hundred and fifty-five.

/s/ JOHN J. SULLIVAN,
Clerk of the Surrogate's
Court.

[Endorsed]: Filed February 17, 1956.

In the District Court for the District of Alaska,
Fourth Judicial Division

No. 6885 Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

40 ACRES OF LAND, SITUATE IN NENANA
RECORDING PRECINCT, FOURTH DIVI-
SION, TERRITORY OF ALASKA, and DAN
T. KENNEDY, DUKE E. STUBBS, MRS.
ELIZABETH S. STUBBS and ALL OTHER
PERSONS OR PARTIES UNKNOWN
CLAIMING ANY RIGHT, TITLE, ESTATE,
LIEN OR INTEREST IN THE REAL ES-
TATE DESCRIBED HEREIN,

Defendants.

JUDGMENT AS TO TRACT "B"

This matter coming before the Court on the
Stipulation of Mary E. Weiss, Executrix of the
estate of Mrs. Elizabeth S. Stubbs, the sole owner
of Tract "B," described herein, as a result of the
will of Duke E. Stubbs, said Stipulation being
entered into by the plaintiff through its attorney,
the United States Attorney, and said Stipulation
providing that Four Thousand Dollars (\$4,000.00)
shall be just compensation for Tract "B," and

Whereas the default of Duke E. and Elizabeth S.
Stubbs was duly entered by this Court on the 25th
day of August, 1952, after said defendants were

duly and regularly served with notice by publication,

It Is Now Hereby Ordered, Adjudged and Decreed that

1. The United States pursuant to this Judgment shall have an estate in fee simple for the purposes and pursuant to the authority set forth in the complaint herein in the following property, to wit:

The south half ($\frac{1}{2}$) of the southeast quarter ($\frac{1}{4}$) of the northeast quarter ($\frac{1}{4}$), the north half ($\frac{1}{2}$) of the north half ($\frac{1}{2}$) of the northeast quarter ($\frac{1}{4}$) of the southeast quarter ($\frac{1}{4}$), and the north half ($\frac{1}{2}$) of the south half ($\frac{1}{2}$), of the north half ($\frac{1}{2}$) of the northeast quarter ($\frac{1}{4}$) of the southeast quarter ($\frac{1}{4}$) of Section 4 in Township 14 South of Range 7 West of the Fairbanks Meridian, Alaska, containing thirty-five (35) acres, according to the official Plat of Survey of the said land, on file in the Bureau of Land Management.

2. The United States shall pay to Mary E. Weiss as just compensation for the tract described above, the amount of Four Thousand Dollars (\$4,000.00) inclusive of interest and the Court hereby expressly approves the Stipulation by the parties herein.

3. The United States has the right and authority to take said land pursuant to the acts of Congress set forth in the complaint herein and the use for which said property has been taken is for public use, to wit, said property is now a part of the Mount McKinley National Park.

4. No costs or attorneys' fees shall be awarded to either party to this action.

Done at Fairbanks, Alaska, this 24th day of February, 1956.

/s/ VERNON D. FORBES,
District Judge.

Lodged February 24, 1956.

[Endorsed]: Filed and entered February 27,
1956.

[Title of District Court and Cause.]

CLERK'S RECEIPT

I, John B. Hall, Clerk of the United States District Court for the Fourth Judicial Division, District of Alaska, do hereby certify that on the 2nd day of April, 1956, I received from the United States of America, plaintiff, herein, and deposited in the Registry of the Court, the sum of Four Thousand Dollars (\$4,000.00), pursuant to the Judgment as to Tract "B" hereinbefore entered confirming the awards as to Tract "B" in the above-entitled condemnation proceeding.

Dated at Fairbanks, Alaska, this 2nd day of April, 1956.

[Seal] /s/ JOHN B. HALL,
Clerk.

[Endorsed]: Filed April 2, 1956.

[Title of District Court and Cause.]

NOTICE OF HEARING

To the Defendants Above Named and to Davis, Renfrew and Hughes, His Attorneys:

You, and Each of You, Will Please Take Notice that the Motion for Change of Place of Trial will be called on for hearing in the court room of the above-entitled Court at Fairbanks, Alaska, on the 16th day of November, 1956, at the hour of 1:30 p.m. on said day, or as soon thereafter as counsel can be heard.

Dated at Fairbanks, Alaska, this 5th day of November, 1956.

/s/ GEORGE M. YEAGER,
United States Attorney.

[Endorsed]: Filed November 6, 1956.

[Title of District Court and Cause.]

ORDER FOR CHANGE OF VENUE

Defendant, Dan T. Kennedy, having heretofore filed a motion for change of place of trial to the above-entitled cause to the District Court for the Third Division of the Territory of Alaska, and the United States having settled the matter except as

to the defendant Dan T. Kennedy and making no objection to the motion:

Now, Therefore, It Is Hereby Ordered and Adjudged that the above-entitled matter shall be transferred for trial to the District Court for the Third Division, Territory of Alaska.

The Clerk of this Court is hereby directed to forward the records and files in this matter to the Clerk of the District Court for the Territory of Alaska, Third Division for further proceedings in that Court.

Done at Fairbanks, Alaska, this 16th day of November, 1956.

/s/ VERNON D. FORBES,
District Judge.

[Endorsed]: Filed and entered November 16, 1956.

[Title of District Court and Cause.]

MINUTE ORDER IN RE TRIAL DATE

Upon the motion of Edward V. Davis, It Is Ordered that the above cause be ready for trial upon 60 days' notice.

Entered January 3, 1957.

In the District Court for the District of Alaska,
Third Division

(Formerly No. 6885—Fourth Division)

Civil No. 12,883

[Title of Cause.]

MOTION FOR EARLY TRIAL

Comes now Donald A. Burr, Assistant United States Attorney, and moves that the above-referenced case be set for trial at the earliest convenience of the Court for the following reason:

That the instant case concerns the taking of property by the Government through condemnation proceedings with the sole issue remaining to be decided a determination of just compensation. Undue delay in the trial of said case has caused hardship on the owners of such property and will continue to so do until such time as they are adequately compensated by the United States Government.

Dated at Anchorage, Alaska, this 15th day of May, 1957.

/s/ DONALD A. BURR,
Assistant United States
Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed May 15, 1957.

[Title of District Court and Cause.]

MINUTE ORDER GRANTING MOTION
FOR EARLY TRIAL

Now at this time, upon the Court's motion; It Is Ordered that the motion for early trial in the above cause, be and hereby is granted and cause to be heard by the next visiting judge on a date to be set for July, 1957.

Entered May 31, 1957.

[Title of District Court and Cause.]

MINUTE ORDER SETTING CAUSE
FOR TRIAL

The above cause is set for trial Monday, December 16th, 1957, at 10:00 a.m. Trial will take approximately 2 days.

Entered December 9, 1957.

[Title of District Court and Cause.]

TRIAL BY JURY

Plaintiff United States represented in court by Assistant United States Attorney Donald A Burr.
Defendant Mr. Dan J. Kennedy present in court and represented by counsel Mr. Edward V. Davis.

A discussion of questions at issue by Court and counsel.

Case will be stricken from Trial Calendar for today and will later try and set this case for trial in January.

Decision will be reserved as to questions of jurisdiction relating to defenses to the taking, raised by the Answer and whether complaint may be amended.

Counsel for the defense will submit briefs to Court by December 23rd and the Government may have until December 30th to answer by brief and a reply by defendant by January 3rd, 1958.

At 10:45 o'clock Court declared recess for 10 minutes.

Ten Fifty-five o'Clock A.M.

Court resumed session.

The Court announced to the jurors present that no jury will be required in this case and that they were accordingly excused to report to the Main Courtroom at 10:00 o'clock a.m. Wednesday, December 18th, 1957.

Entered December 16, 1957.

[Title of District Court and Cause.]

AMENDED COMPLAINT

1. This is an action of a civil nature brought by the United States of America for the taking of property under the power of eminent domain and

for the ascertainment and award of just compensation to the owners and parties in interest.

2. The request for condemnation originates from the Solicitor for the Department of Interior, which request was in the form of a letter addressed to the Attorney General of the United States of America and is attached hereto as Exhibit 1.

3. The Solicitor for the Department of Interior is duly authorized to institute condemnation proceedings for and on behalf of the Secretary of the Interior pursuant to Departmental Order No. 2509, Amendment No. 7, a copy of which is attached hereto as Exhibit 2.

4. The authority for the taking in the instant case is the Act of August 1, 1888, as amended (62 Stat. 986; 40 U.S.C., 1946 ed., Supp. III, sec. 257), and Interior Department Appropriation Act, 1951 (Chap. VII, Public Law 759, 81st Cong.).

5. The use for which the property is being taken is as a part of Mount McKinley National Park, Alaska, within which exterior boundaries it is now located as shown by the plat attached hereto as Exhibit 3. The proposed use has been determined in the interest of the United States and otherwise necessary and advantageous to the Government by the Solicitor of the Department of the Interior for and on behalf of the Secretary of said Department. See Exhibit 1.

6. The interest to be acquired in the property is an estate in fee simple.

7. The property so to be taken is in the Nenana Recording Precinct, Fourth Judicial Division, Territory of Alaska, and is more particularly described as follows:

Tract A: The south half ($\frac{1}{2}$) of the northwest quarter ($\frac{1}{4}$) of the southeast quarter ($\frac{1}{4}$) of the northeast quarter ($\frac{1}{4}$) of Section 4 in Township 14 South of Range 7 West of the Fairbanks Meridian, Alaska, containing five acres, according to the Official Plat of Survey of the said land, on file in the Bureau of Land Management;

Tract B: The south half ($\frac{1}{2}$) of the southeast quarter ($\frac{1}{4}$) of the northeast quarter ($\frac{1}{4}$); the north half ($\frac{1}{2}$) of the north half ($\frac{1}{2}$) of the northeast quarter ($\frac{1}{4}$) of the southeast quarter ($\frac{1}{4}$), and the north half ($\frac{1}{2}$) of the south half ($\frac{1}{2}$) of the north half ($\frac{1}{2}$) of the northeast quarter ($\frac{1}{4}$) of the southeast quarter ($\frac{1}{4}$) of Section 4 in Township 14 South of Range 7 West of the Fairbanks Meridian, Alaska, containing thirty-five (35) acres, according to the official Plat of Survey of said land, on file in the Bureau of Land Management,

together with all buildings and improvements, if any, all appurtenances thereto, and all interests therein, as shown on the plat attached hereto and by this reference made a part hereof as Exhibit 4.

8. The persons known to the plaintiff to have or claim an interest in the property are:

Tract A (as described in paragraph 7)—Dan T. Kennedy;

Tract B (as described in paragraph 7)—Duke E. Stubbs, Mrs. Elizabeth S. Stubbs.

9. In addition to the persons named, there are or may be others who have or claim some interest in the property to be taken, whose names are unknown to the plaintiff and on diligent inquiry have not been ascertained. They are made parties to the action under the designation “Unknown Owners.”

Wherefore, the plaintiff demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

Dated at Anchorage, Alaska, this 26th day of December, 1957.

/s/ DONALD A. BURR,
Assistant United States
Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed December 26, 1957.

PLAINTIFF'S EXHIBIT NO. 1

United States Department of the Interior
Office of the Solicitor
Washington 25, D. C.

Jun. 26, 1951

The Honorable,
The Attorney General,
Washington 25, D. C.

Sir:

In connection with the administration, protection, and development of Mount McKinley National Park, Alaska, as established by the act of February 26, 1917 (39 Stat. 938), and acts supplementary thereto and amendatory thereof, I have determined that it is necessary, advantageous, and in the interest of the United States to acquire by condemnation the tracts of land, aggregating forty acres, situated within the exterior boundaries of the Park. One of these tracts is owned by Mrs. Elizabeth S. Stubbs, whose most recent address is understood to be 545 West 111th Street, Apartment 6-B, New York City 25, New York. The other tract is owned by Dan T. Kennedy, whose address is believed to be Anchorage, Alaska.

The lands proposed for condemnation are described in the enclosed certified copies of patents numbered 1037562 and 1062549, to which are attached copies of a plat, marked Exhibit "A," showing the boundaries of the two tracts. As indi-

ated in the enclosed letters of April 2, 1951, and April 19, 1951, from the United States Commissioner, Nenana, Alaska, and the Manager of the Land Office, Fairbanks, Alaska, title records other than the enclosed patents from the United States are not available with respect to these two tracts. It appears, therefore, that there are no transfers of record affecting the land in question.

It is requested that you cause condemnation proceedings to be instituted pursuant to the act of August 1, 1888, as amended (62 Stat. 986; 40 U.S.C., 1946 ed., Supp. III, sec. 257), to acquire these lands in fee simple, subject to existing easements for roads, highways, and public utilities, if any.

Funds appropriated by the Interior Department Appropriation Act, 1951 (Chapter VII, Public Law 759, 81st Cong.), are available for payment of the awards to be made for these lands (Appropriation symbol: 14X1035—Account 341.11 MTMK).

This application for the institution of proceedings for condemnation, and the determination contained herein, are made in the exercise of authority delegated by the Secretary of the Interior under Section 2 of Reorganization Plan No. 3 of 1950 (15 F. R. 3174) to the Solicitor of the Department of the Interior in section 28 of Order No. 2509, as amended (15 F. R. 5058).

Any additional information desired by the United States Attorney may be obtained from the Super-

intendent, Mount McKinley National Park, McKinley Park, Alaska.

Very truly yours,

/s/ MARTIN G. WHITE,
Solicitor.

Enclosures 5.

Duly Certified.

PLAINTIFF'S EXHIBIT NO. 2

United States Department of the Interior
Office of the Secretary

79903

July 31, 1950

Order No. 2509, Amendment No. 7.

Subject: Delegations of Authority—General.

A new section, numbered 28 and reading as follows, is added to Order No. 2509:

Sec. 28 Acquisition of real estate by condemnation.

(a) The Solicitor of the Department of the Interior is authorized to exercise the power of the Secretary of the Interior under section 1 of the act of August 1, 1888 (25 Stat. 357), as amended (40 U. S. C., 1946 ed., Supp. III, sec. 257), to acquire real estate for the United States by condemnation, under judicial process, whenever in the opinion of the Solicitor it is necessary or advantageous to the

Government to do so, and the Solicitor is authorized to submit to the Attorney General of the United States applications for the institution of proceedings for condemnation.

(b) The Solicitor of the Department of the Interior is authorized to exercise the power of the Secretary of the Interior under section 1 of the act of February 26, 1931 (46 Stat. 1421, 40 U. S. C., 1946 ed., sec. 258a), to sign declarations of taking.

(Issued under section 2, Reorganization Plan No. 3 of 1950, 15 F. R. 3174.)

/s/ WILLIAM G. WARNE,
Acting Secretary of the
Interior.

[Title of District Court and Cause.]

MINUTE ORDER RE COURT
TRIAL CALENDAR

During the call of the 1958 Term of Court Calendar, January 2, 1958, and upon stipulation of respective counsel, this cause, No. A-12883, was set for trial, in chronological order, to follow cause No. A-12877.

Entered January 2, 1958.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes Now Dan T. Kennedy, one of the above-named defendants, and moves that plaintiff's amended complaint be dismissed for the reason that the same does not state a claim in favor of the plaintiff and against the defendant, Dan T. Kennedy, upon which any relief can be granted by this court. This motion is based on all the records and files in this action and is supported by the brief and reply brief filed on behalf of the defendant, Dan T. Kennedy, with reference to plaintiff's original complaint.

Dated at Anchorage, Alaska, this 28th day of January, 1958.

DAVIS, HUGHES &
THORSNESS,

By /s/ EDWARD V. DAVIS,
Attorneys for Defendant,
Dan T. Kennedy.

Receipt of copy acknowledged.

[Endorsed]: Filed January 29, 1958.

[Title of District Court and Cause.]

OPINION

Donald A. Burr,
Assistant United States Attorney,
Anchorage, Alaska,
For Plaintiff.

Davis, Hughes and Thorsness,
Anchorage, Alaska,
For Defendant, Dan T. Kennedy.

Hodge, District Judge.

Plaintiff in this action seeks to acquire by condemnation proceedings certain property owned by the defendant Dan T. Kennedy, consisting of a homestead and improvements thereon, described as 'Tract A' in the complaint herein, located within the exterior boundaries of Mount McKinley National Park. Defendant filed an answer raising objections to the taking, pursuant to Rule 71A (e), FRCP. At the time of the trial defendant raised jurisdictional questions relating to such taking, in substance as follows: (1) There was no allegation in the complaint showing the authority of any officer of the United States to procure the land for the public use claimed, and hence no authority for such condemnation; (2) there was no showing of any specific legislative sanction or authority for condemning the land in question; and (3) the authority for the taking relied upon by plaintiff does not permit the United States to maintain this

action. The Court reserved decision upon these questions on briefs to be submitted.

Thereafter plaintiff filed an amended complaint alleging that the request for the condemnation originated from the Solicitor for the Department of the Interior in the form of a letter addressed to the Attorney General of the United States, and that the Solicitor for such Department is duly authorized to institute the proceeding for and on behalf of the Secretary pursuant to Departmental order No. 2509, amendment No. 7. Copies of the letter and order were attached as exhibits. Defendant then filed a motion to dismiss the amended complaint upon the grounds that it does not state a claim upon which relief may be granted, and both parties submitted briefs on the issues thus raised.

The Government relies in its complaint and brief upon two statutory enactments as authority for the taking, being the Act of August 1, 1888, as amended (62 Stat. 986, 40 USC 257), and the Interior Department Appropriation Act of 1951 (Chap. VII, Public Law 759, 81st Congress, 64 Stat. 692). The first is what has been referred to as the general statute relating to condemnation of private realty for Government use, and provides as follows:

“In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may

acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and Section 258 of this title, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice.” (Emphasis added.)

The general appropriation act relied upon provides, as far as is pertinent here, as follows:

“Chapter VII, National Park Service

“Construction

“For construction and improvement, without regard to the Act of August 24, 1912, as amended (16 U.S.C. 451), of roads, trails, parkways, buildings, utilities, and other physical facilities; and the acquisition of lands, interests therein, improvements, and water rights; to remain available until expended * * *” (Emphasis added.)

The Act of Congress relating to the establishment, boundaries and control of Mount McKinley National Park are found in Title 16, USC, Secs. 347 to 355a, incl. By Sec. 355, adopted March 19, 1932, the boundaries were changed, apparently in-

cluding the lands of the defendant,¹ who acquired his land by patent from the United States on May 24, 1930. Neither the original act establishing such Park nor the amendments thereto contain any specific authorization to the Secretary of the Interior or any other public officer relating to the acquisition by condemnation or otherwise of private lands within the boundaries of the Park; and no such provision is found in the general statutes relating to the jurisdiction and powers of the National Park Service. 16 USC, Secs. 1-18.

By contrast, numerous instances are found in the statutes relating to the establishment of national parks in which the Secretary of the Interior, through the National Park Service, is given express authority to acquire private lands or property with reference to such particular park or place, under the provisions of Sec. 257 of Title 40, all being found in Title 16, USC, as follows: Sec. 47 (e), Yosemite National Park; Sec. 81 (c & d), Colonial National Historical Park; Sec. 164, Glacier National Park; Sec. 242, Theodore Roosevelt National Memorial Park; Sec. 403 (i), Great Smoky Mountains National Park; Sec. 462 (d), Historic Sites and Buildings; Sec. 407 (m), Independence National Historical Park; Sec. 1 (b) (7) (1953),

¹Some question is also raised by Kennedy as to whether or not his property is actually intended to be included within the Park boundaries. However, for the purpose of this motion, the allegations of the complaint must be taken as true.

Acquisition of Right of Way for roads within authorized boundaries of national parks.

If it was the intention of Congress to make similar provision as to Mount McKinley National Park, surely it would have done so. Instead, the 1932 Act contains the following pertinent clause:

“* * * Provided, however, that such isolated tracts of land lying east of the Alaska Railroad right of way and the west bank of the Nenana River between the north bank of Windy Creek and the north park boundary as extended eastward are also included in said park; provided further, that nothing herein contained shall affect any valid existing claim, location, or entry under the land laws of the United States, whether for homestead, mineral, right of way, or any other purpose whatsoever, or shall affect the rights of any such claimant, locator, or entryman to the full use and enjoyment of his land.” (Emphasis added.)

A similar clause relating to existing claims or entry under the land laws is found in the original Act. (16 USC 348.)

It has been held repeatedly that although the Federal Government has the power to take private property essential to the public welfare, it exercises that power only pursuant to specific legislation; that express legislative authority is necessary to authorize the condemnation of private property for public use, and statutes claimed to confer such

power must be strictly construed; and that Sec. 257 of Title 40 confers no general authority to acquire lands by condemnation proceedings but only authority to institute such proceedings in furtherance of or in execution of authority otherwise granted. *United States vs. Raders*, 70 F. 748; *United States vs. A Certain Tract of Land in Cumberland Tp.*, 70 F. 940; *United States vs. Certain Lands in Naragansett, R. I.*, 145 F. 654; *United States vs. Fisk Building, et al.*, 99 F. Supp. 592; *Carmack vs. United States*, 135 F. 2d 196; *United States vs. 43,355 Sq. Ft. of Land in King County, Wash.*, 51 F. Supp. 905; *United States vs. Parcel of Land, etc.*, 100 F. Supp. 498; *Youngstown Sheet and Tube Co., vs. Sawyer*, 103 F. Supp. 569, 575. Sec. 257 is therefore not sufficient authority to sustain this action, in the absence of other specific legislation.

Plaintiff also relies upon the General Appropriation Act above quoted, claiming that the provisions of such Act appropriating funds for the "acquisition of lands," is sufficient to authorize this condemnation, citing *United States vs. Beaty*, 198 F. 284; *United States vs. Graham and Irvine*, 250 F. 499; *Hanson Lumber Co. vs. United States*, 277 F. 894 (affirmed 261 U.S. 581); *United States vs. North American Transp. & Trading Co.*, 253 U.S. 330; *United States vs. Threlkeld*, 72 F. 2d 464, certiorari denied 293 U.S. 620; *Polson Logging Co. vs. United States*, 160 F. 2d 712.

Examining these cases I find that the first three support plaintiff's contention only to the extent

that it is held that words authorizing the "purchase" of land under appropriation acts or general acts must be deemed to include by implication the right to acquire such lands by condemnation proceedings; but in each case specific authorization to purchase or acquire such land appears. In the case of *Hanson Lumber Co. vs. United States* the Supreme Court, on review, said:

"The authority to condemn conferred by * * * Act of 1888) * * * extends to every case in which an officer of the Government is authorized to procure real estate for public uses."

The case of *United States vs. North American Transp. & Trading Co.* does not relate to condemnation proceedings but only to the liability of the United States for the taking of property where not taken under legislative authority.

The cases of *United States vs. Threlkeld* and *Polson Logging Co. vs. United States* do hold that the powers conferred upon the Secretary of Agriculture for the construction and maintenance of roads within the national forest area under 16 USC 471-482 and by appropriation acts are sufficiently broad to confer the authority to condemn land for such purpose under 40 USC 257; and that by necessity the statutory authorization to procure real estate in such cases may be evidenced by the making of an appropriation as well as by specific authorization to acquire. These cases are clearly distinguishable from the case at bar. The Court in the *Threlkeld*

case recognizes the doctrine set forth in the case of *United States vs. Raders* and *United States vs. A Certain Tract of Land in Cumberland Township*, above cited, and is in accord with such principle.

I am unable to find that the General Appropriation Act relating to all of the national parks, as to which in many cases specific authority is conferred upon the Secretary of the Interior to acquire private lands, may be construed by "necessary implication" to authorize the condemnation proceeding in this instance, especially in view of the express preservation of the rights of the holders of land by homestead within the boundaries of the Park, quoted above.

The letter from the Solicitor of the Department of the Interior, and the delegation of authority from the Secretary to the Solicitor of the power conferred by Sec. 257, referred to in plaintiff's amended complaint, do not confer any authority not granted by Congressional enactment.

It must be concluded that the amended complaint fails to state a claim upon which the relief sought may be had. The motion to dismiss is therefore granted. Unless plaintiff requests leave to amend its complaint within twenty days from the date of filing of this opinion, an order may be presented dismissing the cause of action set forth in plaintiff's complaint as to Tract A with prejudice, and with costs to the defendant Kennedy.

Dated at Nome, Alaska, this 6th day of March, 1958.

/s/ WALTER H. HODGE,
District Judge.

[Endorsed]: Filed March 10, 1958.

[Title of District Court and Cause.]

AFFIDAVIT

Third Judicial Division,
Territory of Alaska—ss.

Donald A. Burr, being first duly sworn, deposes and says:

That he is the counsel of record for the plaintiff, United States of America, in the instant action.

That the instant action was instituted in Fairbanks, Alaska, on September 6, 1951, for the condemnation of certain property owned by the defendant Kennedy.

That the case was thereafter transferred from Fairbanks, the Fourth Judicial Division, to Anchorage, Third Judicial Division, upon motion for change of venue submitted by defendant Kennedy.

That the issue of just compensation came on for hearing during the latter part of 1957, at which time the defendant moved for dismissal of the plaintiff's complaint for various reasons.

That the Court ordered briefs submitted, as a result of which the defendant's motion was ultimately granted and the decision on the motion was duly entered on March 10, 1958.

That the Court in its written decision on the defendant's motion, allowed the plaintiff United States of America twenty days from the date of entry of the decision within which to file an amended pleading in this matter.

That the practices and regulations of the Department of Justice require liaison with the lands division in Washington, D. C., on all matters pertaining to condemnation proceedings.

That your affiant, upon receipt of the decision of the Honorable Walter H. Hodge, immediately forwarded same to the Department of Justice urging immediate action.

That your affiant has received a telegraphic communication dated March 14, 1958, from Ralph J. Luttrell, Chief, Land Acquisition Section, Lands Division, Department of Justice, urging an enlargement of time to enable consideration of the Court's recent decision on the defendant's motion to dismiss.

That the liaison required between the field office of the various United States Attorneys and the Department of Justice requires considerable time in most cases, and thus the motion for enlargement of time for a period of thirty days is necessary to enable your affiant to comply with the practices and

regulations of the Department of Justice under whose auspices your affiant is presently working.

Further affiant sayeth not.

Dated at Anchorage, Alaska, this 17th day of March, 1958.

/s/ DONALD A. BURR,
Assistant United States
Attorney.

Subscribed and Sworn to before me this 17th day of March, 1958, at Anchorage, Alaska.

[Seal] /s/ ROSEMARY RICE,
Deputy Clerk.

Receipt of copy acknowledged.

[Endorsed]: Filed March 22, 1958.

[Title of District Court and Cause.]

MOTION FOR ENLARGEMENT
OF TIME

Comes now Donald A. Burr, Assistant United States Attorney, for the plaintiff, United States of America, and moves for an enlargement of time for a period of thirty days from and after the 30th day of March within which to file an amended pleading or take such other action as may appear proper. This motion is supported by affidavit attached hereto and made a part hereof.

Dated at Anchorage, Alaska, this 17th day of March, 1958.

/s/ DONALD A. BURR,
Assistant United States
Attorney.

ORDER

The Court having considered the motion of the plaintiff, United States of America, and being fully advised in the premises, it is hereby

Ordered, Adjudged and Decreed that the motion be and the same is hereby granted.

Dated at Anchorage, Alaska, this 20th day of March, 1958.

/s/ WALTER H. HODGE,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed and entered March 22, 1958.

[Title of District Court and Cause.]

MOTION TO RECONSIDER ORDER SUS-
TAINING DEFENDANT'S MOTION TO
DISMISS GOVERNMENT'S CONDEMNATION
PROCEEDING

Comes now the United States of America, plaintiff herein, by its undersigned attorneys, and moves

the Court to reconsider its order dated March 6, 1958, which sustained defendant's motion to dismiss the condemnation proceeding, subject to the Government amending its complaint within 20 days before the filing of the order dismissing the proceeding, with costs to defendant, on the following grounds:

1. That the authorities cited by the Government in its complaint contains express authorization to the Secretary of the Interior to procure property and to cause this proceeding to be instituted.
2. That "costs" cannot be assessed against the Federal Government in this proceeding in the absence of express legislative authorization.
3. That the Court's holding is contrary to the law and the intent of Congress.

Dated: 23 April, 1958.

/s/ WILLIAM T. PLUMMER,
United States Attorney;

/s/ DONALD A. BURR,
Assistant United States
Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed April 23, 1958.

[Title of District Court and Cause.]

STIPULATION FOR EXTENSION
OF TIME

It Is Hereby Stipulated by and between Donald A. Burr, assistant United States Attorney for the District of Alaska, Third Judicial Division, of the attorneys for the plaintiff, and Edward V. Davis, of the attorneys for the defendant, Dan T. Kennedy, that the defendant Kennedy may have to and including the 15th day of May, 1958, to file statement of reasons in opposition to motion of the plaintiff to reconsider the court's previous order in the above-entitled matter, and to file answering brief to the brief filed by the plaintiff in support of its motion for reconsideration.

Dated at Anchorage, Third Judicial Division, Territory of Alaska, this 28th day of April, 1958.

/s/ DONALD A. BURR,
Assistant United States Attorney, of Plaintiff's Attorneys.

/s/ EDWARD V. DAVIS,
Of Attorneys for the Defendant,
Dan T. Kennedy.

[Endorsed]: Filed April 28, 1958.

[Title of District Court and Cause.]

SUPPLEMENTAL OPINION

William T. Plummer,
United States Attorney, and
Donald A. Burr,
Assistant United States Attorney,
For Plaintiff.

Davis, Hughes and Thorsness,
Anchorage, Alaska,
For Defendant.

Hodge, District Judge.

Plaintiff has moved the undersigned judge of the above-entitled court to reconsider his opinion filed herein on March 10, 1958, wherein the Court sustained a motion of the defendant, Dan T. Kennedy, to dismiss plaintiff's complaint (160 F. Supp. 30). The motion to reconsider is granted and the Court has considered the matter anew upon briefs submitted by both parties.

Plaintiff relies in support of its principal contention that the authority for the taking of the land in question is evidenced by the Interior Department Appropriation Act of 1951, and the Act of August 1, 1888 (40 U.S.C.A., Sec. 257), upon four decisions other than the cases previously considered in such opinion. The case of *United States vs.*

Carmack, 329 U. S. 230 (reversing the Circuit Court, 151 F. 2d 881, following retrial of case cited in my original opinion, 135 F. 2d 196), involves a proceeding instituted by the United States to condemn land as a site for a postoffice, in reliance upon several Federal statutes, including the Public Buildings Act of May 25, 1926 (40 U.S.C.A. 341), and the General Condemnation Act above referred to (40 U.S.C.A. 257). The Public Buildings Act gave specific authority to the Secretary of the Treasury (later the Federal Works Administrator) "to acquire by purchase, condemnation or otherwise, such sites * * * as he may deem necessary * * *". The Court holds that the United States has inherent power to appropriate land determined necessary for the public use, when such power is exercised by Congress. To quote from the opinion (p. 240):

"The considerations that made it appropriate for the Constitution to declare that the Constitution of the United States, and the laws of the United States made in pursuance thereof, shall be the supreme law of the land make it appropriate to recognize that the power of eminent domain, when exercised by Congress within its constitutional powers, is equally supreme."

"We find in the broad terms of the Public Buildings Act authority for the designated officials to select the site they did. We find, in both

Acts, authority for them to acquire by condemnation the site thus lawfully selected.”¹

The right of the United States to condemn land is conceded by the defendant and is certainly not denied by this Court, but I agree with the defendant's contention that the question here is whether the United States, through Congress, has exercised that right.

The case of *United States vs. Village of Highland Falls*, 154 F. 2d 224, does not hold as contended by plaintiff that one Congress cannot preclude another from exercising the power of eminent domain, but holds rather that such power is one which even the State Legislature cannot surrender; and relates to the question of a state divesting itself of such governmental authority by contract. This case is clearly not applicable here.

The recent decision of the District Court for the District of Columbia on March 24, 1958 (not yet reported) of *Seneca Nation of Indians vs. Brucker* holds that Congress may, by general legislation,

¹To the same effect see *United States vs. Fisk Building*, 99 F. Supp. 592, wherein the Court said “The power of eminent domain is inherent in the Government as an aspect of sovereignty, subject to the requirement of the Fifth Amendment that just compensation be paid. *Albert Hanson Lumber Co. v. United States*, 261 U. S. 581, 43 S. Ct. 442, 67 L. Ed. 809. However, the power to condemn may be exercised only when explicitly authorized by statute,” citing the *Carmack* case.

override the provisions of an Indian treaty where the intent of Congress to do so is clear, and that an appropriation act which appropriated money for the construction of the Allegheny Reservoir Project "manifested a clear Congressional intention to authorize the construction of the project"; and that since the project was specifically authorized by the appropriation, the right to condemn land for such purpose must be upheld. Similarly, the case of *United States vs. 5,677.94 Acres of Land of the Crow Reservation*, 152 F. Supp. 861, holds that an appropriation act making specific appropriations for preconstruction work on the Yellowtail Dam, furnishes sufficient authority for taking of the land within the boundaries of the Indian reservation, when considered with the General Condemnation Act. These decisions deal with appropriations for a specific project, relying upon authority of the Threlkeld and Polson cases cited in my original opinion, and are likewise not applicable here.

Plaintiff also cites the legislative history of the Interior Department Appropriation Act for 1951 as indicating the intent of Congress to provide for the acquisition of privately owned land in the Mount McKinley National Park. Such history adds nothing to what has already been said on this subject, and that is that the appropriation mentioned was for the "general acquisition of privately owned lands within park and monument boundaries"; and as we have seen, there were many Acts of Congress granting specific authority to condemn lands as to

certain specified national parks, but no such provision as to Mount McKinley National Park.

Plaintiff concedes that Sec. 257 of Title 40 alone is not sufficient authority for its complaint, but contends that the Court “appears to have overlooked the fact that 40 USCA, Sec. 257 contains a general grant of power to officers of the Federal Government to condemn property when such officers are authorized by Congress to procure real estate.” This is an understatement, for this Court certainly did not overlook such fact. However, plaintiff also contends that the cited Appropriation Act “contains a specific grant of the power to acquire land for park purposes,” which “the Court fails to recognize.” No such specific grant of power with reference to Mount McKinley is found in any cited statute. In order to sustain such power there must be a clear intent of Congress, either by conferring “broad powers” such as held in the *Polson* and *Threlkeld* cases, or by specific action as in the *Seneca* and *Crow* cases. To sustain the contention of plaintiff would be to stretch the rule of “legislation by implication” beyond the powers of this Court.

In reference to that portion of my opinion relating to the preservation of the rights of homesteaders or entrymen to the full use and enjoyment of their land provided by the Act of Congress creating the Park (16 USC 348, and 1932 amendment), plaintiff cites the *Yosemite Valley Case*, 82 US 77 (1872), and *Stockley vs. United States*, 260 US 532, which

deal with the question of whether a party, by mere settlement upon lands of the United States under pre-emption laws or as an entryman under homestead laws, acquires such a vested interest in the premises as to deprive Congress or the General Land Office of the power to divest it by a grant to another party. These decisions are not in point. Although such reservation may not be controlling, yet such specific Act of Congress seems important in determining the intent of the Congress with relation to condemnation of private land in Mount McKinley Park.

Plaintiff also contends that reference in the Court's opinion to legislation relating to other park areas should not serve as a "formula so as to decipher or evaluate such laws or legislation upon a comparison basis," and that the comparison made is not justified. Again, such Acts were cited to show the clear intent of Congress as to other national parks to condemn or acquire lands which, significantly, is not mentioned in the Act creating Mount McKinley Park. Incidentally, Congress has recently manifested the same intention in an Act to authorize the establishment of the Petrified Forest National Park in the State of Arizona (Public Law 85-358, 85th Congress, March 28, 1958), which specifically authorizes the Secretary of the Interior to acquire in the public interest any non-Federal land or interests in land within the area authorized to be established by such Park.

Finally, plaintiff contends that the Government cannot be held liable for costs in the absence of specific authorization by Congress, citing *United States vs. Patterson*, 206 F. 2d 345; and that there is no statutory authority for taxing costs against the United States in this instance. This position appears to be correct.

Finding that Congress has not either expressly or by clear intendment authorized the condemnation of land within the Park area here involved, I must adhere to my former opinion, except as to the matter of costs. Order dismissing plaintiff's complaint and this action as to Tract A may be presented accordingly. Findings of fact and conclusions of law will not be necessary.

Dated at Nome, Alaska, this 13th day of June, 1958.

/s/ WALTER H. HODGE,
District Judge.

Received June 16, 1958.

[Endorsed]: Filed June 16, 1958.

In the District Court for the District of Alaska,
Third Judicial Division

Civil No. A-12,883

UNITED STATES OF AMERICA,

Plaintiff,

vs.

40 ACRES OF LAND, Situate in Nenana Recording Precinct, Fourth Division, Territory of Alaska, and DAN T. KENNEDY, et al.,

Defendants.

ORDER OF DISMISSAL

Defendant, Dan T. Kennedy, having heretofore moved for dismissal of the above-entitled cause as against Tract "A" and as against the defendant, Dan T. Kennedy, and the matter having been argued both orally and on written briefs, and the court having heretofore, and on the 6th day of March, 1958, rendered its opinion directing such dismissal and the plaintiff having moved for reconsideration of the matter and the court having granted the motion for reconsideration and having reconsidered the matter upon briefs presented by the respective parties, and the court being fully advised in the premises,

Now, Therefore, it is hereby Ordered and Adjudged that the above-entitled action shall be and

the same is hereby dismissed insofar as it concerns
tract "A" described in plaintiff's complaint and
amended complaint and insofar as it concerns the
defendant, Dan T. Kennedy. This order of dismissal
is made without allowance of costs to either party.

Findings of Fact and Conclusions of law are not
considered to be necessary and need not be prepared
or entered.

Dated at Nome, Alaska, this 25th day of
June, 1958.

/s/ WALTER H. HODGE,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed and entered June 25, 1958.

Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given under the provisions of
rule 73, Federal Rules of Civil Procedure, that the
plaintiff, United States of America, hereby appeals
to the United States Court of Appeals for the Ninth
Circuit from the final order dismissing the plain-
tiff's complaint. The entire record, including ex-
hibits, is hereby designated to be included for the
purpose of this appeal.

Dated at Anchorage, Alaska, this 8th day of August, 1958.

WILLIAM T. PLUMMER,
United States Attorney;

By /s/ GEORGE F. BONEY,
Asst. United States Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed August 8, 1958.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE
ORIGINAL RECORD

I, Wm. A. Hilton, Clerk of the above-entitled Court, do hereby certify that pursuant to Rule 10 (1) of the Rules of the United States Court of Appeals, Ninth Circuit, I am transmitting herewith the Original Papers in my office dealing with the above-entitled action or proceeding, no designation of record having been filed.

The papers herewith transmitted constitute the record on appeal to the United States Court of Appeals, Ninth Circuit, San Francisco, California, from Order of Dismissal filed and entered in the above-entitled cause by the above-entitled Court on the 27th day of June, 1958.

Dated at Anchorage, Alaska, this 3rd day of September, 1958.

[Seal] /s/ WM. A. HILTON,
Clerk.

cc: United States Attorney,
Federal Building,
Anchorage, Alaska.

Davis, Hughes & Thorsness,
P. O. Box 477,
Anchorage, Alaska.

[Endorsed]: No. 16179. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Dan T. Kennedy, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Third Division.

Filed and Docketed: September 9, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16179

UNITED STATES OF AMERICA,

Appellant,

vs.

DAN T. KENNEDY,

Appellee.

STATEMENT OF POINTS ON APPEAL

The United States of America, appellant, makes the following statement of points upon which it intends to rely on appeal:

1. The District Court erred as a matter of law in holding that the Secretary of the Interior lacked the power to take by eminent domain the property involved in this action.

2. The District Court erred as a matter of law in holding that the Act of September 6, 1950, 64 Stat. 595, 692, and the Act of August 1, 1888, 25 Stat. 357, as amended, 40 U.S.C. sec. 257, together with other statutes of which the District Court could have taken judicial notice do not constitute statutory authority for the taking of the property involved in this action by eminent domain.

3. The District Court erred in holding that Congress has not either expressly or by clear intentment authorized the condemnation of land within the park area involved in this action.

4. The District Court erred in holding that the amended complaint failed to state a claim on which the relief sought may be had and in dismissing the complaint.

THE UNITED STATES OF
AMERICA,

By /s/ PERRY W. MORTON,
Assistant Attorney General;

/s/ ROGER P. MARQUIS,

/s/ A. DONALD MILEUR,
Attorneys, Department of Jus-
tice, Washington 25, D. C.

Certificate of service acknowledged.

[Endorsed]: Filed October 16, 1958.

